

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EQ29WB-64851
EEOC AGCY NO. 17E-2014-00529

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| Malika M. Whitfield, |) | |
| |) | |
| Complainant, |) | <u>Administrative Action</u> |
| |) | |
| v. |) | FINDING OF PROBABLE CAUSE |
| |) | |
| Statewide Roadside Assistance, LLC, |) | |
| and Neal Prasad, Individually, |) | |
| |) | |
| Respondents. |) | |

On September 19, 2014, Malika Whitfield (Whitfield) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Statewide Roadside Assistance, LLC (Statewide), and its owner, Neal K. Prasad, subjected her to sexual harassment that resulted in a hostile work environment and constructive discharge, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondents denied the allegations of discrimination and constructive discharge in their entirety. DCR's ensuing investigation found as follows.

Statewide is a towing company in Toms River comprised of drivers, mechanics, dispatchers, and an office manager. Neal Prasad is the company's president. Whitfield is a Jackson resident who began working for Respondent as a dispatcher in June 2013 for \$10/hr. She stated that at some point, her salary was increased to \$12/hr.

In February 2014, Whitfield separated from the company after she had an argument with Prasad about work-related issues. Whitfield stated that she obtained a job with TNL Medical Transportation soon after her separation from Respondent. She returned to work at Statewide in May 2014 for \$13/hr. The parties dispute the circumstances that led to her return. Respondent claims that Whitfield "beg[ed] for her job back." Whitfield, on the other hand, claimed that Prasad asked her to return, and even invited her and her boyfriend to his home for a meal with his family, and that she agreed only after negotiating the pay increase and Prasad's assurance that she would be assigned to daytime hours.

Whitfield alleged that Prasad often made inappropriate comments in the workplace but the comments became more frequent and more personal after she returned to work in May. For example, Whitfield claimed that shortly after she returned, Prasad asked her and Office Manager Christine Kelly if they shaved their vaginas and told them that his wife, Kim Prasad, did not. Whitfield alleged that near the end of June, Prasad asked her in Kelly's presence whether she engaged in anal sex and stated that his wife did not. She alleged that Prasad asked if she knew

about Kegel exercises and stated that his wife was either doing them or had performed them in the past.

Whitfield alleged that Prasad said, "I'm hiring you back with all this money you are going to have to give me something." She alleged that on July 8, 2014, near the end of her shift, Prasad remarked that she was being "nice" and she replied, "I am always nice." She alleged that Prasad stated, "I was thinking if you were not being nice, I would have to bend that ass over and spank it." She alleged that as she got up from her desk, Prasad pressed his whole body against her. She alleged that Prasad said that they should "get some liquor" and said, "shots for everybody."

Whitfield stated that she decided that she would not return to work the next day. She confided in Kelly, who told her that she also had decided not to return the following day. Kelly advised Whitfield to cash her paycheck before resigning because Respondent had stopped payment on checks in the past when an employee left the company.

The next day, July 9, 2014, Whitfield sent a text message to Kim Prasad at 7:14 a.m., stating that she was running late and would be at work by 8:30 a.m. Whitfield told DCR that she sent the text to allow her time to get to the bank and cash her check. Once she cashed the check, Whitfield sent a text message to Kim Prasad at 9:16 a.m., stating in part:

After staying up half the night tossing and turning I have decided I cannot work for statewide anymore between the verbal and sexual harassment the place has become unbearable and I can no longer tolerate it...

[ellipse in original]

Whitfield told DCR that she complained to Kim Prasad about her husband's inappropriate jokes by saying "[he] gets carried away with his jokes, he is reaching." Whitfield stated that she did not give any specific details about the jokes or comments. She alleged that Prasad replied that Whitfield should ignore his jokes and comments.

Respondents insisted that there was "no sexual harassment and no inappropriate conduct of any kind on the part of Mr. Prasad or anyone else at Statewide," and that Whitfield was "unabashedly lying." Respondents assert that Whitfield concocted the sexual harassment claim to justify her separation so that she could collect unemployment benefits. Respondents assert that Whitfield received five written reprimands for lateness between December 31, 2013, and February 14, 2014, and two written reprimands in January 2014 for "failing to print or dispatch the dispatches and failing to complete her dispatch obligations before her shift" and "for not recording money given to one of the drivers," and was warned on July 2, 2014, that she would be fired the next time she was late to work. Respondents note:

On February 19, 2014, Complainant was verbally reprimanded by Mr. Prasad for not properly coordinating the drivers. Complainant began yelling and cursing at him, telling him he had no idea what he was talking about, then left in the middle of her shift. As a result, Mr. Prasad terminated her employment. This is a very

pertinent fact that Complainant omits from her Complaint in this matter. A more important fact Complainant omits from her Complaint is that after she was terminated, she applied for unemployment benefits but was denied such because she had been terminated for cause.

Soon after being terminated, Complainant contacted Mr. Prasad apologizing for her behavior and begging for her job back. Mr. Prasad agreed to hire her back but made clear that he would not tolerate any more lateness . . . Mr. Prasad explained to her that there would no longer be constant write-ups for tardiness but that instead, she would be terminated again if the same issues existed . . . [O]n June 30, 2014, Complainant was one hour late for work. Accordingly, on July 2, 2014, Complainant was issued a formal written warning advising that the next time she was late she would be terminated.

Respondents argue that on July 9, 2014, Whitfield knew that she was going to be fired for lateness so she preemptively resigned and “added the allegation of verbal abuse and sexual harassment as an afterthought to her quitting” to help her obtain unemployment benefits.

Respondents argue that if Whitfield genuinely had discrimination complaints against Prasad, she could have reported them to the office manager or Ms. Prasad.

Respondents provided written statements from former and current employees, some of whom had worked with Complainant in the office, stating that they never witnessed Prasad engage in any inappropriate conduct or make any inappropriate comments. DCR interviewed five female employees (J.Mc., G.N., A.M., M.G., P.L.) and two male employees (G.G. and N.S.) who stated that Prasad never engaged in inappropriate comments or conduct.

Likewise, M.D., who supervises the truck drivers and repairmen, told DCR that he never heard Prasad make any sexual comments in the workplace. He described Whitfield as a good dispatcher who could not come to work on time. He said that he believed that she quit because she knew she was going to be fired for being late. He said that there was an issue between Prasad and Whitfield’s boyfriend, who used to work for the company. He said that Prasad loaned a car to Whitfield but found out that she was letting her boyfriend drive it so he took the car away. M.D. said that there was an incident when the boyfriend came to the facility and threatened Prasad, so the police were called.

Former Office Manager Christine Kelly corroborated most of Complainant’s allegations. She stated that after Whitfield was separated from Respondent in February, Prasad called Whitfield and asked her to return. Kelly stated that Prasad also asked her to try to persuade Whitfield to return. Kelly confirmed that Prasad asked them if they shaved their vaginas. Kelly claimed that Prasad asked, “Do y’all shave your pussy? My wife does not, I don’t like it.” Kelly stated that on another occasion, Prasad said something related to anal sex but she did not recall the details. Kelly stated that Prasad asked them if they knew about Kegel exercises and told them that the exercises helped women get “situated down there.” Kelly’s version of the events on July 8, 2014, were as follows: Prasad came to relieve Complainant from work and said, “You were awfully nice today.” Kelly said, “She may not be tomorrow.” Prasad stated, “If you are

not nice, I'm going to bend you over the table and spank you." Kelly stated that she saw Prasad rub his body against Complainant when the latter got up from her chair.

Kelly stated that she told Whitfield she would not be returning to work on July 9, 2014, and that Whitfield replied she was not going to return either. Kelly advised her not to resign until after she cashed her check because of Respondent's history of either cancelling checks or shortening employees' pay when they quit. Kelly stated that she resigned because she could was tired of Prasad's inappropriate comments and bad temper, among other reasons.

Kelly stated that at Prasad's direction, she issued the July 2, 2014, written warning to Whitfield for being late. Kelly stated that she did not foresee Prasad actually firing Whitfield because he needed her as a dispatcher.

Kelly was asked about her role as an office manager and her responsibilities regarding employee complaints. She stated that she had no control over complaints and that if she ever approached Prasad about complaints against him, she would have been fired.

J.M., a former dispatcher who worked for Respondent from around August through October 2013, told DCR that Prasad once asked her to sit on his lap. She stated that on another occasion, Prasad had some male friends in the office. They were drinking. She stated that Prasad asked her to do him a favor and tell him who was on the schedule. She said because Prasad's friend was sitting underneath the schedule, which was affixed to the wall, it meant that she had to place her chest in front of the man to read the schedule. J.M. claimed that she was uncomfortable with the way Prasad spoke to his wife. She said that she heard him say to Kim over the phone, "You dumb bitch I will put you out."

Former dispatcher B.O. stated that Prasad told her, "Show me your tits." B.O. stated that shortly before being contacted by DCR, Prasad phoned her and told her to tell the investigator that he would never say anything inappropriate in the workplace and was "a family guy." She understood that Prasad was asking her to lie to the investigator.

Analysis

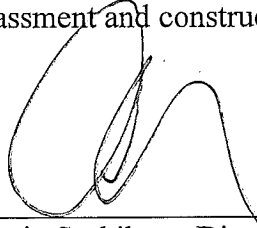
At the conclusion of an investigation, the Director is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. N.J.A.C. 13:4-10.2. Probable cause for purposes of this analysis means a "reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert.den., 111 S. Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than the required by a complainant in order to prevail on the merits." Ibid.

Hostile working environment is a form of gender discrimination. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 607 (1993). In such cases, the critical inquiry is whether a reasonable woman would find the conduct to be severe or pervasive enough to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. Id. at 603. In reaching that determination, courts focus on the conduct itself, not its effect upon the plaintiff or the workplace. Cutler v. Dorn, 196 N.J. 419, 430-31 (2008). Neither a plaintiff's subjective response to the harassment, nor the defendant's subjective intent, is controlling as to whether a hostile environment claim is viable. Ibid. Moreover, the Supreme Court has recognized that where the harasser is the ultimate supervisor, the employee's dilemma is "acute and insoluble" because she has "nowhere to turn." See Taylor v. Metzger, 152 N.J. 490, 505 (1998).

In this case, the two competing versions of events are directly at odds. Perhaps Respondents will be able to persuade an administrative law judge that the allegations are meritless and nothing more than Whitfield's attempt to manipulate the unemployment benefits system. However, in view of the governing legal standards and given the corroborating testimony of Kelly and, to a lesser extent, J.M. and B.O., the Director finds—for purposes of this disposition only—that there is sufficient evidence that Prasad subjected Whitfield to sexual conduct that a reasonable woman would find severe or pervasive enough to alter the conditions of employment and create an intimidating, hostile, or offensive working environment, and that Prasad's conduct could be considered so intolerable that a reasonable person would be forced to resign rather than continue to endure it. Shepard v. Hunterdon Develop. Ctr., 174 N.J. 1, 28 (2002). In reaching that finding, the Director takes into account the fact that Prasad is the president of the company and, therefore, his conduct "carries with it the power and authority of the office." Taylor, supra, 152 N.J. at 505.

In other words, the Director is satisfied at this preliminary stage of the process that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits" of Whitfield's allegations of sexual harassment and constructive discharge.

DATE: 4-23-15



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS